INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
A. Proof of materiality	2
B. Proof of perjury	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Bank of Vance v. *Crowder*, 194 N.C. 331, 139 S.E. 604	12
Blair v. *United States*, 250 U.S. 273	8
Carroll v. *United States*, 16 F. 2d 951, certiorari denied, 273 U.S. 763	7
Cook v. *United States*, 26 App. D.C. 427	8
Doto v. *United States*, 223 F. 2d 309, certiorari denied, 350 U.S. 847	11
Hashagen v. *United States*, 169 Fed. 396	8
Radomsky v. *United States*, 180 F. 2d 781	10
Segal v. *United States*, 246 F. 2d 814, certiorari denied, 355 U.S. 894	8
Sullivan v. *United States*, 348 U.S. 170	6
United States v. *Collins*, 272 F. 2d 650, certiorari denied, 362 U.S. 911	10
United States v. *Icardi*, 140 F. Supp. 383	8
United States v. *Palese*, 133 F. 2d 600	8
United States v. *Russell*, 255 U.S. 138	7
United States v. *Searcy*, 180 F. 2d 837, certiorari denied, 339 U.S. 979	9
United States v. *Wood*, 14 Pet. 430	10
Weiler v. *United States*, 323 U.S. 606	9

Statutes and regulations:

Act of February 25, 1903, 32 Stat. 904, 49 U.S.C. 47	3
Interstate Commerce Act, § 222(g), 49 Stat. 565, as amended, 49 U.S.C. 322(g)	2

Page

Labor-Management Relations Act, § 302, 61 Stat. 157, 29 U.S.C. 186 12
18 U.S.C. 1951 6
49 C.F.R. 182.4420 12

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 549

EDWARD F. WEINHEIMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (J.A. 136) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1960. On November 18 the time for filing a petition for a writ of certiorari was extended to November 26, 1960, by order of Chief Justice Warren. The petition for a writ of certiorari was filed on

[1] "J.A." refers to the Joint Appendix used in the Court of Appeals which is on file with the Clerk of this Court.

November 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the false testimony on which a perjury prosecution was based was material to the grand jury's inquiry.

2. Whether the evidence was sufficient to meet the quantum of proof required for perjury prosecutions.

3. Whether the trial court properly permitted the testimony of an expert witness in regard to the uniform accounting system in force under the regulations of the Interstate Commerce Commission.

STATEMENT

Petitioner was convicted in the District Court for the District of Columbia on eight counts charging perjury before a grand jury of the District of Columbia on August 28, September 2, and September 3, 1959 (J.A. 3-26). He was given concurrent sentences of one to three years' imprisonment on all eight counts (J.A. 134). On appeal the conviction was affirmed.

A. *Proof of Materiality.* At the trial, the foreman of the grand jury, Mr. Harold L. Burk, testified concerning the matters under investigation by the grand jury. These matters concerned possible violations of § 222(g) of the Interstate Commerce Act (49 Stat. 565, as amended, 49 U.S.C. 322(g))—specifically, whether certain reports to the Interstate Commerce Commission and the pertinent records of Exhibitors' Services Company, Inc., a licensed motor carrier, were inaccurate (J.A. 27). The foreman identified a copy of a

report to the Commission as an exhibit before the grand jury[2] (J.A. 29-31). The report reflected an item for office and other expenses which, it was suspected, was not so attributable (J.A. 28, 90, 92). The president of Exhibitors' Services Company, Inc., was called as a witness before the grand jury and testified that the moneys involved had been sent to petitioner (who held a position with the company in a labor relations capacity) in connection with petitioner's efforts to forestall an imminent strike (J.A. 29, 34, 39, 42, 43, 45). The president, Mr. Callahan, was never told how the money was used (J.A. 41, 45, 46). Petitioner was thereupon called as a witness before the grand jury and was compelled to testify under a grant of immunity[3] (J.A. 69). He denied receiving the moneys in question (J.A. 73; 74-75, 84-90, 92, 95-96, 98-100, 113-114, 117-119). Those denials were the basis of the charge of perjury.

B. *Proof of Perjury.* The government's principal witness at the trial was the president of Exhibitors' Services Co., Mr. George F. Callahan, Jr. Mr. Callahan detailed the recent history of his company's labor problems, and the fact that petitioner was hired, in January 1957, in the hope that he would be able to help in the solution of those problems (J.A. 31-34). Petitioner had a history of labor union affiliation, and was personally acquainted with some of the chief figures in the Teamsters Union, with which Exhibitors' Services Co. was dealing (J.A. 34-35, 75-77). Peti-

[2] The report was later admitted into evidence at the trial as Government's Exhibit 23 (J.A. 124).

[3] Act of February 25, 1903, 32 Stat. 904, 49 U.S.C. 47.

tioner, in the course of his efforts to solve the company's labor problems, made various trips around the country to meet officials of the union (J.A. 35-37). On one such trip, in August 1957, while in Des Moines, Iowa, where he went to meet a top Teamster official named Barney Baker, he placed a telephone call to Mr. Callahan and requested that $1,000 in cash be sent to him immediately (J.A. 37-39). When pressed for the reason, he stated that Mr. Callahan should "trust" him (J.A. 39). Mr. Callahan thereupon caused a company official, Mr. Frank Lacey, to write out a check for $1,000 on the company's funds, go to the bank and cash the check, and return the proceeds to him (J.A. 40). That same day envelopes were made out and addressed to petitioner at his address in Des Moines, the cash was placed in them, the envelopes sealed, and Mr. Lacey was directed to send them by registered mail (J.A. 40-41). Mr. Lacey testified concerning the obtaining of the funds and the mailing of the envelopes (J.A. 47-51). He also testified concerning the entry of the item covering the thousand-dollar check in the company's books (J.A. 52-53). The check was introduced in evidence as well as the entries in the cash disbursements book of the company (J.A. 40, 121).

The registered mail receipts signed by petitioner were introduced in evidence (J.A. 56, 61). Postal officials from the sending and receiving post offices testified concerning the documents and also concerning the relevant postal regulations which require that registered mail must be sealed (J.A. 54-57, 60-61, 64). Finally, the proprietor of the Des Moines motel at which petitioner was staying testified that petitioner

had made inquiry about when mail could be expected and that he had witnessed petitioner signing for and receiving registered letters on August 15 (J.A. 57-60).

A similar story was unfolded concerning the mailing to petitioner, pursuant to another phone call from him, of another $1,000 in September 1957 to a hotel in Detroit at which he was sharing a room with a Teamster official (J.A. 41-45, 51-53, 62-65). This occurred just prior to the calling-off of an imminent strike (J.A. 43).

Mr. Callahan also testified that he questioned petitioner upon his return regarding the moneys that had been sent to him (J.A. 41, 45). Mr. Callahan stated:

> I tried to press him for some further explanation relative to the disposition of the moneys. And he got rather aggravated and said to me, "I would cut off my right arm before I would tell you what I did" [J.A. 46].

Petitioner did not testify at the trial. In his testimony before the grand jury he stated that on the first occasion when he received registered mail from Esco (Exhibitors' Services Co.), in August 1957, in Des Moines, the envelopes contained salary and expense checks. The checks which he identified as having been received by him at that time were dated August 17, 23, 24 and 30, respectively, and he denied receiving any three of the checks on the same day. Petitioner also denied receiving any cash by registered mail (J.A. 92-94).

ARGUMENT

1. Petitioner attacks the materiality of the questions put to him as to whether he received the money reflected in the company books as office expenses, arguing that, as to the false-report charge being investigated, the grand jury already knew that the report was false and that his testimony could have no bearing on any criminal charge because the company officials (the president and bookkeeper) had previously been granted immunity. Petitioner's argument overlooks the possibility that the corporation could be prosecuted, apart from its agents. It obviously would be material to any charge against the corporation to have testimony as to possible violations of the appropriate statutes. Moreover, aside from the issue of the truth or falsity of the report, it was within the scope of the grand jury's competence to follow up the suggestion, inherent in the testimony of the company officials, that the moneys had actually been used to buy off labor trouble, and to determine whether petitioner's disbursement of the funds indicated a violation of Section 302 of the Taft-Hartley Act (61 Stat. 157, 29 U.S.C. 186) or of the Hobbs Anti-Racketeering Act (18 U.S.C. 1951). *Sullivan* v. *United States*, 348 U.S. 170, 173. Petitioner's contention that he was "persecuted" by being called before the grand jury after the company officials (Callahan, the president, and Lacey, the bookkeeper) had been called to testify and had thus been granted immunity from prosecution by operation of statute, is without merit. Petitioner, too,

received immunity, and the grand jury could not be expected to anticipate that he would lie to it under oath.

Petitioner contends that the record is devoid of testimony to establish that the grand jury was *in fact* delayed, obstructed, or influenced by the alleged false testimony. It is puzzling how he can make such a contention, and then himself allude to the foreman's testimony that the grand jury had not been able to conclude its investigation, or come to a decision in the matter. Moreover, even if there were no testimony with regard to the actual obstruction of the grand jury, the government's proof would not be deficient, since it is not the actual effect of the false statement that is at issue, but whether the false statements have a "natural effect or tendency" to obstruct the investigation. *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763. See *United States* v. *Russell*, 255 U.S. 138, 143, to the effect that, on a charge of obstructing justice, success of the attempt need not be shown.

Even if the grand jury had known to a certainty that the financial statements were false, it was justified in calling petitioner as a witness. The duties of the grand jury are summarized in *Carroll* v. *United States*, 16 F. 2d at 953, certiorari denied, 273 U.S. 763, as follows:

> "* * * Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been

committed, and to charge the proper person with the commission thereof. * * *

A grand jury can never be sure it has enough evidence, nor on the other hand that contrary evidence which explains the seeming violation is not present. It can only be sure whether or not it has done a thorough job of investigating, *i.e.*, whether or not it has called all witnesses with any possible relevant information to offer to its task of investigating all violations of the criminal law. Cf. *Blair* v. *United States*, 250 U.S. 273, 281-282.[4]

2. The attack on the sufficiency of the evidence to meet the special requirements of proof of perjury is without merit.

As to the mailing of the money to petitioner, Callahan was a direct witness that he placed money in the envelope. The corroboration offered was not that of a second eye-witness to this incident, but the perjury rule does not require the corroboration to be in the form of a second direct witness. It is well-settled that corroboration may be in the form of circumstantial evidence. *Cook* v. *United States*, 26 App. D.C. 427, 430; *Hashagen* v. *United States*, 169 Fed. 396, 399 (C.A. 8); *United States* v. *Palese*, 133 F. 2d 600, 602 (C.A. 3); *Segal* v. *United States*, 246 F. 2d 814, 816 (C.A. 8), certiorari denied, 355 U.S. 894. Whether the corroboration offered was "trustworthy" is for

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[4] The case of *United States* v. *Icardi*, 140 F. Supp. 383 (D. D.C.), relied upon by petitioner, is inapposite. That involved a legislative inquiry about a murder overseas which the judge found to be an inquiry into guilt or innocence, not for a legitimate legislative purpose.

the jury to determine, under the appropriate instructions. *Weiler* v. *United States*, 323 U.S. 606, 610-611. The corroboration in the case at bar was abundantly sufficient. It was Callahan's testimony that, in order to send the moneys to petitioner, he first obtained the funds by having checks made out on the company's account payable to Lacey, and then upon the return of the money to him, placed it in envelopes addressed to petitioner for the occasion, and had them sent by registered mail to petitioner, the first time in Des Moines, Iowa, the second time in Detroit, Michigan (J.A. 39-41, 43-45). The company official, who wrote out and cashed the checks in the first instance, returned the money to Callahan, and then took the sealed envelopes to the post office, corroborated Callahan's testimony in every respect (J.A. 49-52). The checks were introduced into evidence, and, in addition, the books and records of the company contained entries reflecting the thousand dollar checks (J.A. 39, 44, 49, 51, 52). That was itself sufficient corroboration. Compare *United States* v. *Searcy*, 180 F. 2d 837 (C.A. 3), certiorari denied, 339 U.S. 979, a case in which books of account showing payments were held to constitute sufficient circumstantial corroboration of the payment.

As to receipt of the registered mail by petitioner, petitioner's counsel admitted to the jury (J.A. 128):

> There is no dispute about that. That evidence is unrefuted. He did receive the mail.

Thus, the only question was whether the envelopes which petitioner admittedly received were the same envelopes which Callahan sent, that is, the envelopes into which Callahan had placed the money. As to this, the sequence proved at the trial was as follows: Mr. Callahan testified that he placed the money requested by the petitioner into envelopes, sealed the envelopes, and gave them to Mr. Lacey with instructions to mail them to petitioner. Mr. Lacey testified that he took the envelopes given him by Mr. Callahan and went to the post office, where he deposited them by registered mail. The post office documents were then produced. These included the registered mail receipts which petitioner signed. In addition, a witness testified who saw petitioner sign the receipts in Des Moines and receive his mail, and post office officials testified that registered mail must be sealed.

This evidence, it is submitted, is direct proof of the fact that petitioner received the envelopes containing the money. That some slight inference might be required does not detract intrinsically from the nature of direct proof. *Radomsky* v. *United States*, 180 F. 2d 781, 783 (C.A. 9). The cases do not, in every instance equate the direct proof required in such prosecutions with immediate eye witness testimony on the fact issue. *United States* v. *Wood*, 14 Pet. 430. See *United States* v. *Collins*, 272 F. 2d 650 (C.A. 2), certiorari denied, 362 U.S. 911, where on a charge that the defendant falsely swore that he had signed certain minutes of a union meeting during a specified period of time, the Government produced evidence

that the particular kind of type used to type the minutes had not been in existence until after the period sworn to by the defendant. The court of appeals, in affirming the conviction, stated (272 F. 2d at 652):

> * * * Whether the evidence is "direct" in the sense in which the term is usually used should not be the criterion here. The test should be rather whether the evidence is of a quality to assure that a guilty verdict is solidly founded. * * *

See also *Doto* v. *United States*, 223 F. 2d 309 (C.A. D.C.), certiorari denied, 350 U.S. 847.

3. Petitioner complains that the trial court improperly permitted an expert witness for the Government to testify concerning the meaning of an account number (4420) to which certain items in the company's ledger were to be posted. At one point the witness was asked the significance of certain numbers assigned to the various accounts and, over objection, he stated that the Interstate Commerce Commission had a uniform accounting system which its licensees were required to follow, that standard account numbers existed which stood for various account names, and that account number 4420, to which the entries in the company's books regarding the checks in question were to be posted, stood for office and other expenses (J.A. 124-126). The objection to the inquiry was stated to be that the regulations of the ICC were themselves the best evidence of their nature and contents, and that the witness' testimony would be hearsay (J.A. 125). Petitioner does not, and could not, contend that the

testimony was not an accurate statement of the regulations. See 49 C.F.R. 182.4420.

There is no showing that the trial court abused its discretion in permitting the answers. The rule is that a properly qualified expert witness may testify concerning the meaning of entries in books of account. *Bank of Vance* v. *Crowder*, 194 N.C. 331, 139 S.E. 604. Here, the questions involved a minor and collateral matter, not related to the issues to be submitted to the jury, and the trial court could have taken judicial notice of the regulation. That it permitted an expert witness to give the pertinent information was not prejudicial to petitioner, where the accuracy of the testimony is not disputed.

In any event, it should be recognized that (1) the testimony in question was accurate, (2) it related only to the issue of materiality which was an issue of law for the court and not for the jury, and (3) the testimony was merely corroborative of earlier testimony relating to materiality. For these reasons, and because the testimony did not relate to issues involving petitioner personally, its allowance, if it was error at all, was, as the Court of Appeals stated, at most harmless error.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER, 1960.